Supreme Court, U.S.
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No. 92-1318

In The

Supreme Court of the United States

October Term, 1992

THE STATE OF TEXAS,

Petitioner,

v.

JAMES JOSEPH WILKENS, JR.,

Respondent.

Petition For Writ Of Certiorari To The Court Of Criminal Appeals For The State Of Texas

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

Respondent agrees with Petitioner's Statement of the Case with the exception of the following material fact omissions:

At sentencing the State called Dr. Tynus McNeel. (SF-XXXIII-12) He testified that the Respondent did not agree to waive his privilege against self-incrimination. (SF-XXXIII-14) He testified that he did not advise the Respondent of a possibility that he would testify at a punishment hearing as to whether he would receive the death penalty nor obtain a waiver of self-incrimination from the Respondent specifically for such testimony. (SF-XXXIII-15) Dr. McNeel subsequently testified ". . . . I feel that there definitely is a probability of future acts of violence in a person like this." He further testified the "probability" was "strong", ". . . . maybe a moderately high to high probability." (SF-XXXIII-29)

Dr. Thomas Allen testified at the sentencing hearing that he did not advise the Respondent that he had the right to remain silent or that it was possible that statements he made would be used against him in a punishment hearing on the issue of future dangerousness. (SF-XXXIII-74) He told the Respondent that the purpose of the ". . . . evaluation was to determine his sanity and competency to stand trial. . . . " (SF-XXXIII-73,74) Thereafter Dr. Allen testified ". . . . that there is a probability that he will continue to be a threat to society to commit criminal acts." "I think that he is a high probability – at high probability." (SF-XXXIII 79) He further testified that Respondent's ". . . . chances for rehabilitation" were "minimal". (SF-XXXIII-88) He testified ". . . . that there is

a probability that he is going to be a continued threat with regard to criminal acts of violence toward society." (SF-XXXIII-114)

SUMMARY OF ARGUMENT

This Court should deny the Petition for Writ of Certiorari because the Texas Court of Criminal Appeals holding in the case at bar was based upon *Estelle v. Smith,* 101 S.Ct. 1866 (1981) and certain Texas Court of Criminal Appeals precedents, not upon a misapplication of this Court's holding in *Buchanan v. Kentucky,* 107 S.Ct. 2906 (1987).

Petitioner's Petition should be denied for the additional reason that given the fact situation presented in the case at bar the analysis conducted by the Texas Court of Criminal Appeals was in accord with the principles laid down by this Court in *Satterwhite v. Texas,* 486 U.S. 249 (1988) and *Chapman v. California,* 386 U.S. 18 (1967) and the harmless error rule was properly applied in the decision of the Texas Court.

ARGUMENT

1. THE TEXAS COURT OF CRIMINAL APPEALS DID NOT MISAPPLY THIS COURT'S HOLDING IN *BUCHANAN v. KENTUCKY* WHEN IT HELD THAT A CRIMINAL DEFENDANT DOES NOT WAIVE HIS FIFTH AMENDMENT RIGHT TO SILENCE WITH RESPECT TO THE ADMISSION OF PSYCHIATRIC TESTIMONY CONCERNING FUTURE DANGEROUSNESS DURING THE PUNISHMENT STAGE OF A BIFURCATED CAPITAL MURDER TRIAL WHEN HE REQUESTS PRE-TRIAL PSYCHIATRIC EXAMINATIONS AND PRESENTS TESTIMONY IN SUPPORT OF HIS CLAIM DURING THE GUILT/INNOCENCE STAGE OF THE TRIAL.

The defendant-petitioner in *Buchanan v. Kentucky,* 107 S.Ct. 2906 (1987), was prosecuted for non-capital murder. The pertinent question raised was whether the admission of evidence from a psychiatric examination of the petitioner offered for the sole purpose of rebutting psychological evidence introduced by the petitioner in his attempt to establish an affirmative mental-status defense, violated his Fifth (and Sixth) Amendment rights. The Court held that when a defendant requests a psychological examination or presents psychiatric evidence the prosecution may present the report of the requested examination to rebut such presentation without implicating the defendant's privilege against self-incrimination.

The Texas Court of Criminal Appeals held that Respondent's Fifth Amendment privilege was not violated at the guilt/innocence phase of his capital murder trial by the prosecution's use, in rebuttal, of testimony by Drs. McNeel and Allen in regard to his insanity. *Wilkens v. State,* (Petitioner's Appendix "A") at 9. In so holding that

Court relied primarily on *Buchanan v. Kentucky. Wilkens, supra* at 4-9. In so doing the Texas Court did not misapply the Court's holding in *Buchanan.*

The Texas Court of Criminal Appeals reversed the Respondent's conviction because his Fifth Amendment privilege against self-incrimination was violated by the testimony of Drs. McNeel and Allen at the penalty phase concerning his future dangerousness. *Wilkens, supra* at 13. The Texas Court's decision was predicated primarily on *Estelle v. Smith,* 101 S.Ct. 1866 (1981) in which this Court recognized a Fifth Amendment privilege at the punishment phase on the issue of future dangerousness, together with a group of Texas Court of Criminal Appeals precedents. *Wilkens, supra* at 9-12. The Court's holding in *Buchanan* is again referred to and some language from *Powell v. Texas,* 109 S.Ct. 3146 (1989) which dealt with a Sixth Amendment violation was included:

> "Nothing in *Smith,* or any other decision of this Court, suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity defense at the guilt stage of trial." *Id.* at 3150, n. 3. *Wilkins, supra* at 13.

No basis can be found for Petitioner's assertion that the Texas Court of Criminal Appeals misapplied this Court's holding in *Buchanan v. Kentucky,* in reaching its decision in the case at bar. Therefore, it is the contention of Respondent that Petitioner's assertion in its Writ regarding a misapplication of this Court's holding in *Buchanan v. Kentucky* is without merit and does not require any additional argument from Respondent.

2. THE TEXAS COURT OF CRIMINAL APPEALS DID NOT MISAPPLY THE HARMLESS ERROR ANALYSIS OF *CHAPMAN V. CALIFORNIA* AND *SATTERWHITE V. TEXAS* IN CONCLUDING THAT IT COULD NOT FIND BEYOND A REASONABLE DOUBT THAT THE EXPERT TESTIMONY DID NOT CONTRIBUTE TO THE JURY'S ANSWERS TO THE SPECIAL ISSUES.

In its Petition Petitioner acknowledges that this Court has noted in *Satterwhite v. Texas,* 486 U.S. 249 (1988), that a reviewing court can make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected the capital sentencing jury, and that the harmless error rule requires the reviewing court to be able to find beyond a reasonable doubt that the constitutional error did not contribute to the verdict. Petitioner then takes exception to the Texas Court's judgment upon the matter and proceeds to attack the *Satterwhite* opinion describing it as an aberration and an anomaly. Petitioner then calls upon this Court to change the standard for determining harmless error.

It thus appears that the alleged "misapplication" of the harmless error rule enunciated in *Chapman v. California,* 386 U.S. 18 (1967) and *Satterwhite v. Texas, supra,* by the Texas Court of Criminal Appeals in the case at bar in reality relates to Petitioner's dissatisfaction with the holdings of this Court in these cases and the Texas Court's adherence to the principles of law set forth therein.

Unlike *Satterwhite* in which a considerable amount of evidence was introduced by the State at sentencing in addition to that of the psychiatrist, in the case at bar Drs. McNeel and Allen were the only witnesses to testify for

the State at sentencing, *Wilkens, supra* at 14. Following a discussion of the content of their testimony the Texas Court found it to be impossible to conclude the jury was convinced of Respondent's future dangerousness without the aid of the same. *Wilkens, supra* at 15. The opinion then went on to state as follows:

> "There being no showing otherwise, we cannot find beyond a reasonable doubt that this expert testimony did not contribute to the jury's answers to the special issues." *Wilkens, supra* at 15.

Petitioner argues that the evidence properly admitted at the guilt phase of the trial was ample to sustain the verdict. However, *Chapman* teaches that this is not the question – the question being whether the State proved "'. . . . beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' *Chapman,* 386 U.S., at 24, 87 S.Ct. at 828." *Satterwhite, supra* at 1798.

No basis can be found for Petitioner's assertion that the Texas Court of Criminal Appeals misapplied the harmless error analysis of *Chapman* and *Satterwhite* in concluding that it could not find beyond a reasonable doubt that the testimony of Drs. McNeel and Allen did not contribute to the jury's answer to the special issue of future dangerousness. Therefore, it is the contention of Respondent that Petitioner's assertion in its Writ regarding misapplication of *Chapman* and *Satterwhite* by the Texas Court of Criminal Appeals in without merit and does not require any additional argument from Respondent.

CONCLUSION

For the reasons presented above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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